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FIRST GENERAL COUNSEL'S REPORT

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MUR: 5544

DATE COMPLAINT FILED: September 27, 2004

DATE OF NOTIFICATION: October 4, 2004

LAST RESPONSE RECEIVED: November 30, 2004

DATE ACTIVATED: October 20, 2005

EXPIRATION OF SOL: July 23, 2009

COMPLAINANT:

Missouri Democratic Party

RESPONDENTS:

Missourians for Hanaway and Susan Ely, in her
official capacity as treasurer
Bush-Cheney '04, Inc. and Salvatore Purpura,¹ in his
official capacity as treasurer

RELEVANT STATUTES:

2 U.S.C. § 431(20)(A)(iii)
2 U.S.C. § 434(b)
2 U.S.C. § 434(f)
2 U.S.C. § 441a
2 U.S.C. § 441b
11 C.F.R. § 100.29
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED: FEC Disclosure Reports

OTHER AGENCIES CHECKED: Missouri Ethics Commission (Campaign Finance
Reports)

I. INTRODUCTION

This matter concerns alleged coordination between Missourians for Hanaway ("the
Hanaway Committee"), which was Catherine Hanaway's 2004 campaign committee for Missouri

¹ David Herndon was the treasurer for Bush-Cheney '04, Inc. during the time of the activity alleged in the complaint. He was replaced by Salvatore Purpura on January 18, 2006. See Amended Statement of Organization.

1 Secretary of State, and Bush-Cheney '04 ("Bush-Cheney").² Complainant Corey Dillon of the
2 Missouri Democratic Party alleged that the two campaigns coordinated their efforts in the
3 production and dissemination of a television advertisement that promoted and supported
4 President George W. Bush. The advertisement, known as the "Said No" ad, contained footage of
5 the President and Hanaway taken at a Bush-Cheney rally. According to the complaint, the
6 advertisement constituted both an in-kind contribution to the President's campaign and an
7 electioneering communication that may have been funded by corporate contributions and that
8 was not properly disclosed to the Commission. The complaint alleged that the President and his
9 campaign were materially involved in the production of this advertisement.

10 For the reasons set forth below, we recommend that the Commission find no reason to
11 believe that the Hanaway Committee made, or that Bush-Cheney knowingly received, excessive
12 or prohibited in-kind contributions in the form of a coordinated television advertisement. The
13 Complainant has presented insufficient information regarding the conduct element of the
14 coordinated communication test to warrant an investigation in this matter. Further, the
15 advertisement does not appear to promote or support the President and appears to fall under the
16 State and local candidate exemption to the electioneering communication provisions of the
17 Federal Election Campaign Act of 1971, as amended ("the Act").

18 **II. FACTUAL BACKGROUND**

19 It appears that the footage depicting President Bush with Hanaway was recorded at a
20 Bush-Cheney event that took place in St. Charles, Missouri on July 20, 2004. *See* Complaint

² At the time, Hanaway was Speaker of the Missouri House of Representatives. She was the Republican candidate for Secretary of State in the November 2004 general election, but lost the election to Democrat Robin Carnahan.

1 at 2; *Remarks in St. Charles, Missouri; Week Ending Friday, July 23, 2004*, 40 Weekly
2 Compilation of Presidential Documents 1341 (Jul. 26, 2004) ("*Remarks*"). The President's only
3 remarks concerning Hanaway at that rally consisted of the following: "I want to thank Madam
4 Speaker for her kind introduction. Catherine, thank you for your leadership and your service."
5 *Remarks*, at 1341. According to the Hanaway Committee, the campaign advertisement aired on
6 Missouri television stations, but the committee fails to specify which stations aired the
7 advertisement or to indicate the dates that it aired. Hanaway Response at 1. The Complainant
8 indicated that the advertisement had been running for several weeks on cable television stations,
9 including fewer than thirty (30) days before the Republican National Convention and as late as
10 September 2, 2004, which would be within 120 days of the general election in November 2004.
11 Complaint at 3.

12 The complaint briefly describes the advertisement, but neither a copy nor a transcription
13 of it was enclosed with the complaint.³ As described in the complaint, "[t]he ad opens with the
14 president at a podium introducing Ms. Hanaway to the applause of the crowd and closes with the
15 two candidates standing together and waving to the audience while they are jointly cheered and
16 applauded." Complaint at 2. The complaint adds that the "presidential seal is conspicuously
17 depicted on the podium" that appears in the advertisement and that the advertisement promotes
18 and supports the President by "depicting him being warmly cheered and applauded by a
19 noticeably appreciative crowd." *Id.*

³ The complaint states, "A transcription of the ad is enclosed." However, the Commission never received a copy. Despite a number of follow up inquiries, both following receipt of the complaint and following activation of the matter, the Complainant still has not provided the Commission with a transcript. Hanaway's campaign website is no longer operating and the advertisement could not be located through publicly available sources.

1 According to the Hanaway Committee, the thirty second advertisement opens with
2 President Bush saying, "Catherine, Thank you for your leadership and your service," and then he
3 is shown shaking hands with Hanaway.⁴ Hanaway Response at 1. The President also appears at
4 the end of the advertisement where he and Hanaway are shown waving to a crowd of spectators.
5 *Id.* at 2.

6 In its response to the complaint, the Hanaway Committee explained that the
7 advertisement was "prepared solely by agents of Missourians for Hanaway," that there were no
8 other federal candidates depicted in the commercial and that the President's campaign signs were
9 not even readable in the advertisement. Hanaway Response at 2. The response also states that
10 there was no involvement by the President or his agents and, as far as they knew, there were no
11 common vendors, former employees or independent contractors of the President's campaign
12 involved with the production of the advertisement. *Id.* The response specifically denies that the
13 President or his agents ever "requested or suggested the commercial, was materially involved in
14 its preparation, or had any substantial discussions" with the Hanaway Committee about it. *Id.*

15 Bush-Cheney also denies that the President's campaign had any involvement with the
16 production and distribution of the "Said No" ad. Bush-Cheney Response at 1. According to
17 Bush-Cheney, the President appeared at a public rally with a number of candidates, including
18 Hanaway. *Id.* However, Bush-Cheney states it was not even aware that the event was being

⁴ The Hanaway Committee describes the rest of the advertisement as follows:

Next, Representative Hanaway begins to speak from the podium stating: "My name is Catherine Hanaway, and you may recognize me from my commercials. Technically, they were the Governor's commercials. Thanks to you all when the Governor asked for the third time for tax increases that would have totaled more than 1.2 billion dollars, we could stand up and say no and it stuck." The visuals displayed as Representative Hanaway speaks alternate between Representative Hanaway alone at the podium and scenes from the State Capitol. Word messages describing Representative Hanaway's achievements are overlaid on the pictures. In the final three seconds, President Bush and Representative Hanaway are again shown waving to the crowd. The commercial concludes with the paid for by information and the audio statement "Catherine Hanaway, Secretary of State." Hanaway Response at 1-2.

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1 filmed for use in an advertisement and did not have any involvement with any decisions relating
2 to the advertisement. *Id.* Bush-Cheney also states that it “did not request or suggest the creation,
3 production or distribution” of the advertisement, that it did not “approve or review the ad,” that it
4 “did not have any material involvement (or have any involvement at all) in any decisions related
5 to th[e] advertisement,” and that it “did not engage in substantial discussions” with the Hanaway
6 Committee about the advertisement.⁵ *Id.*

7 **III. LEGAL ANALYSIS**

8 Based on the available information and as analyzed below, the “Said No” ad was neither
9 an in-kind contribution to Bush-Cheney, nor was it an electioneering communication. It does not
10 appear to be an in-kind contribution by the Hanaway Committee to Bush-Cheney because there is
11 nothing to indicate the alleged material involvement of Bush-Cheney actually took place, and no
12 other conduct that would result in coordination has been alleged. Similarly, the advertisement
13 falls under the State and local candidate exemption to the electioneering communication
14 provisions.

15 **A. Coordinated Communication**

16 A payment for a coordinated communication is an in-kind contribution to the candidate’s
17 authorized committee with which it is coordinated and must be reported as an expenditure made
18 by that candidate’s authorized committee.⁶ 11 C.F.R. § 109.21(b)(1). Further, in-kind
19 contributions to federal candidates or their committees are subject to the limitations, source

⁵ The Bush-Cheney response also states that although the complaint does not allege use of a common vendor, former employee, independent contractor or the dissemination of campaign materials, it was “not aware of any information that would lead to a conclusion that these provisions have been violated.” Bush-Cheney Response at 1.

⁶ The Act defines expenditures by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents” as in-kind contributions. 2 U.S.C. § 441a(a)(7)(B)(i).

1 prohibitions and disclosure requirements of the Act. *See, e.g.*, 2 U.S.C. §§ 434(b), 441a and
2 441b.

3 In order to be a coordinated communication, the "Said No" ad would have to satisfy a
4 three-pronged test. *See* 11 C.F.R. § 109.21. First, the advertisement must have been paid for by
5 a person other than the federal candidate or the federal candidate's committee. The Hanaway
6 Committee admits that the "Said No" ad was "prepared solely by agents of Missourians for
7 Hanaway" and does not deny paying for the production and airing of the advertisement.
8 Therefore, the payment element of the coordination regulation appears satisfied. *See* Hanaway
9 Response at 2; 11 C.F.R. § 109.21(a)(1).

10 Second, the content element of the coordination regulation is satisfied if the
11 communication at issue meets at least one of four content standards: (1) it is an electioneering
12 communication as defined in 11 C.F.R. § 100.29(a); (2) it is a public communication that
13 republishes, disseminates, or distributes candidate campaign materials; (3) it is a public
14 communication containing express advocacy; or (4) it is a public communication, in relevant
15 part, that refers to a clearly identified federal candidate, is publicly distributed or disseminated
16 120 days or fewer before a primary or general election, and is directed to voters in the
17 jurisdiction of the clearly identified candidate.⁷ *See* 11 C.F.R. § 109.21(c).

18 The "Said No" ad appears to satisfy the content element of the coordination test as a
19 public communication that refers to a clearly identified federal candidate and that was publicly

⁷ In *Shays v. FEC*, No. 04-5352 (D.C. Cir. July 15, 2005), the Appellate Court affirmed the District Court's invalidation of the fourth "public communication" content standard of the coordinated communications regulation. The District Court had remanded the matter back to the Commission, but in a ruling subsequent to the remand, the District Court explained that the "deficient rules technically remain 'on the books,'" pending promulgation of a new regulation. *Shays v. FEC*, 340 F. Supp. 2d 39, 41 (D.D.C. 2004). This Office believes that despite the Appellate Court ruling, the public communication standard is still in effect until a new standard is promulgated, particularly in cases like this where the standard, held to be underinclusive, is met.

distributed or disseminated 120 days or fewer before a general election.⁸ 11 C.F.R. § 109.21(c)(4). The advertisement displays President Bush and appears to meet the 120-day time frame set forth in the content standard. Specifically, the complaint was filed on September 27, 2004, and noted that the advertisement had “run for several weeks on cable TV systems in Missouri,” and had been “running as recently as September 2nd,” within 120 days of the November 2, 2004 general election. Complaint at 2-3. In fact, the Bush-Cheney rally that appears in the advertisement took place on July 20, 2004, also falling within the 120-day time frame. The “Said No” ad was also publicly distributed and was directed to voters in Missouri, a jurisdiction of the clearly federal identified candidate. *See, e.g.*, 11 C.F.R. § 100.29(c)(3)(i) (defining “publicly distributed” in the context of electioneering communications as being “aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system”). Further, although we have no information regarding the costs, in all likelihood it was broadcast for a fee. Thus, the content element of 11 C.F.R. § 109.21 appears to be satisfied.

The third prong of the coordinated communication test requires the advertisement to meet one of the six conduct standards set forth in 11 C.F.R. § 109.21(d): (1) communications made at the request or suggestion of the relevant candidate or committee; (2) communications made with the material involvement of the relevant candidate or committee; (3) communications made after substantial discussions between the person paying for the communication and the clearly identified candidate; (4) the use of a common vendor; (5) the actions of a former employee; and (6) specific actions relating to the dissemination of campaign material. 11 C.F.R. § 109.21(d). Only the second standard is relevant in this matter.

⁸ The Said No ad is not an electioneering communication. *See infra* at pp. 9-11.

1 The complaint alleges that coordination took place through material involvement of
2 Bush-Cheney in the production and airing of the Hanaway campaign advertisement.⁹ Complaint,
3 at 3-4. However, the complaint fails to allege any facts showing how the President or his agents
4 may have been involved with the preparation of the advertisement. Instead, the allegations in the
5 complaint are limited to speculation that Bush-Cheney must have been involved based on the
6 Commission's statements in Advisory Opinion 2003-25 (Weinzapfel). In Advisory Opinion
7 2003-25, the Commission stated "it is highly implausible that a Federal candidate would appear
8 in a communication without being materially involved in one or more of the listed decisions
9 regarding the communication." See also Advisory Opinions 2004-1 (Forgy Kerr) and 2004-29
10 (Akin)

¹⁰ However, unlike the federal candidates in
those cases, it appears that neither the President nor his agents even knew about the creation and
distribution of the "Said No" ad.

13 Although the President and his agents may have been involved in planning the Bush-
14 Cheney rally held on July 20, 2004, it appears they were not involved with any decisions
15 pertaining to the production of the "Said No" ad and were not even aware that the advertisement
16 was being produced. In its response to the complaint, Bush-Cheney affirmatively denies that it

⁹ The complaint does not allege any specific facts to indicate that a request or suggestion was made, that substantial discussion or the dissemination of campaign materials occurred, or that a common vendor or former employee was used. Review of the Hanaway Committee's state campaign reports revealed three possible vendors who, based on the type of work they perform, may have been used in the production of the Said No ad. Specifically, the Hanaway Committee paid American Viewpoint \$1,500 for "Research," paid John Hancock & Associates over \$33,000 for "Strategic Consulting," and paid Scott Howell & Company over \$1.6 million for "Media Expense[s]." Bush-Cheney also used all three of these companies throughout the course of its campaign. However, the complaint does not specifically identify any of these vendors.

¹⁰ In both Advisory Opinions 2004-1 (Forgy Kerr) and 2004-29 (Akin), it was proposed that the federal candidate would appear and make an endorsement in an advertisement and would review the proposed script prior to the production of the advertisement.

1 had any knowledge that the rally was being recorded “for use in any public communication by
2 [Hanaway] or any other candidate.” Bush-Cheney Response at 1. The response further states
3 that Bush-Cheney was not involved in any way in decisions relating to the advertisement. *Id.*
4 The Hanaway Committee confirms this information in its response, stating that the “Said No [ad]
5 was prepared solely by agents of Missourians for Hanaway” and that the Hanaway Committee
6 did not even obtain permission to videotape the President’s appearance and remarks at the rally.
7 Hanaway Response at 2. As a result of the unintentional nature of the President’s appearance in
8 the advertisement, it does not appear to be a coordinated communication and thus, does not
9 constitute an in-kind contribution from the Hanaway Committee to Bush-Cheney as alleged.

10 **B. Electioneering Communication**

11 Complainant also alleged that the “Said No” ad constituted an electioneering
12 communication that may have been funded by prohibited corporate contributions. An
13 electioneering communication is one that is a “broadcast, cable or satellite communication
14 that . . . refers to a clearly identified candidate for Federal office” and is “publicly distributed . . .
15 within 30 days before . . . a convention or caucus of a political party that has authority to
16 nominate a candidate.” 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29(a).

17 Specifically excluded from the definition of electioneering communication, however, are
18 communications that are not Federal election activity,¹¹ and are “paid for by a candidate for State
19 or local office in connection with an election to State or local office.” 11 C.F.R. § 100.29(c)(5).
20 That exemption “covers public communications by State and local candidates that do not

¹¹ Among other things, Federal election activity is defined as “a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office.” 2 U.S.C. § 431(20)(A)(iii).

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1 promote, support, attack or oppose federal candidates.” Explanation and Justification, *Final*
2 *Rules on Electioneering Communications*, 67 Fed. Reg. 65190, 65198 (Oct. 23, 2002).

3 In Advisory Opinion 2003-25 (Weinzapfel), the Commission stated that “[u]nder the
4 plain language of the FECA, the mere identification of an individual who is a Federal candidate
5 does not automatically promote, support, attack, or oppose that candidate.” The advertisement
6 discussed in that opinion featured Senator Evan Bayh appearing in front of an American flag,
7 with the words “Senator Evan Bayh” on the screen, endorsing a local candidate for mayor. The
8 advertisement also depicted the Senator and the local candidate in various scenes together. In
9 that matter, the Commission did not construe the endorsement as promoting or supporting the
10 Senator.

11 Here, the “Said No” ad displayed the President through actual video footage of him and,
12 according to the complaint, it was broadcast throughout the State of Missouri within 30 days of
13 the Republican National Convention. Although the Complainant did not provide a copy or
14 transcript of the advertisement, and we have been unable to locate it through publicly available
15 sources, we have been able to develop an overall picture of the advertisement from the
16 descriptions provided by both the Complainant and the Hanaway Committee. *See supra* 2-4.
17 Complainant’s description of the advertisement is countered by the Hanaway Committee’s
18 statement that the advertisement did not contain “any visual or audio references to President
19 Bush’s candidacy.” Complaint at 2-3; Hanaway Response at 4. Like Weinzapfel, the statements
20 in the advertisement did not promote, support, attack or oppose the President’s candidacy.
21 Specifically, there were no statements made in the advertisement concerning the President’s
22 record or his position on any issue. In addition, the statements did not make any reference to the
23 President’s candidacy. Rather, the President’s statements in the “Said No” ad served as an

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1 endorsement of the State candidate and appeared to serve as a vehicle to boost Hanaway's State
2 campaign and not the President's federal campaign. Therefore, the "Said No" ad is not Federal
3 election activity. In addition, as discussed *supra*, the Hanaway Committee paid for the
4 advertisement in connection with Hanaway's campaign for Missouri Secretary of State.
5 Therefore, the advertisement falls under the State and local candidate exemption to the Act's
6 electioneering communication provisions. 11 C.F.R. § 100.29(c)(5). Further, because the "Said
7 No" ad does not qualify as Federal election activity, the Hanaway Committee's payments for the
8 advertisement were not subject to the limitations, prohibitions, and reporting requirements of the
9 Act.

10 **C. Conclusion**

11 We recommend that the Commission find no reason to believe that Missourians for
12 Hanaway and Susan Ely, in her official capacity as treasurer, and Bush-Cheney'04 and Salvatore
13 Purpura, in his official capacity as treasurer, violated the Act as it pertains to this advertisement.
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IV. RECOMMENDATIONS

1. Find no reason to believe that Missourians for Hanaway and Susan Ely, in her official capacity as treasurer, violated 2 U.S.C. §§ 441a and 441b, by making excessive or prohibited in-kind contributions in the form of coordinated expenditures to Bush-Cheney '04.
2. Find no reason to believe that Bush-Cheney '04 and Salvatore Purpura, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a and 441b, by knowingly accepting excessive or prohibited in-kind contributions in the form of coordinated expenditures from Missourians for Hanaway.
3. Approve the appropriate letters.
4. Close the file.

Lawrence H. Norton
General Counsel

Date

4/19/04

BY:

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